Supreme Court, U.S.
FILED
JUL 27 2000
CLERK

(16)

No. 99-1178

In The

Supreme Court of the United States

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

BRIEF OF AMICUS CURIAE NATIONAL STONE ASSOCIATION IN SUPPORT OF PETITIONER

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July 27, 2000

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23pp

QUESTION PRESENTED

Whether the "migratory bird rule" can be used lawfully to apply the federal "dredge or fill" permit program to isolated mining ponds that are not connected to navigable waters of the United States.

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INTEREST OF AMICUS CURIAE

The National Stone Association (NSA) is a national trade association representing the interests and concerns of the aggregates and sand and gravel industries, including more than 700 member companies and approximately 120,000 working men and women. NSA has not issued shares or debt securities to the public.

On July 18, 2000, NSA announced ratification of plans for merger with the National Aggregates Association. The merger is expected to be consummated by September 30, 2000. Members of the merged organization will produce more than 90% of the crushed stone and 70% of the sand and gravel produced in the United States. During 1999, a total of about 2.7 billion metric tons of crushed stone and sand and gravel, valued at $13.7 billion, were produced and shipped in the United States. Pursuant to Supreme Court rule 37.3(a), this Brief is accompanied by the written consent of the parties.[1]

STATEMENT OF THE CASE

This case illustrates the problems and perils of extending the federal "dredge or fill" permit program to isolated intrastate waters historically reserved for state

[1] Other attorneys at O'Connor & Hannan are counsel to Petitioners in this case. However, no counsel for a party authored this brief in whole or in part, and no person or entity other than NSA made a monetary contribution to the preparation and submission of this brief. Counsel for NSA recently joined O'Connor & Hannan, effective April 15, 2000.

regulation. The Petitioner, a municipal solid waste agency, proposed to construct a balefill on a former gravel mining site. The site included trenches and depressions from the prior mining activity that became permanent or seasonal ponds upon collection of rainwater. Upon hearing that state conservation staff had observed migratory birds on the property, the Army Corps of Engineers invoked the "migratory bird rule" to require a fill permit under Clean Water Act Section 404 (33 U.S.C. § 1344). The Corps concluded that the isolated ponds were "navigable waters of the United States" subject to Section 404 permit requirements because they are used as habitat by migratory birds. Alleging that the fill activities would destroy the habitat, the Corps ultimately denied the permit, blocking construction of the balefill. An efficient local land use decision, under which an economically stagnant and unproductive property could be managed to produce revenue and serve a vital community need, was effectively overridden by a federal policy that Congress never mentioned when it enacted the Section 404 permit program.

Beneath this case lies a widespread potential for disruption in the mining community, and related state land use programs, if the migratory bird rule can be used to apply the Section 404 permit program to isolated mining waters. Surface mining necessarily involves creation of pits, ponds, trenches, ditches and other excavations that become partially filled with rainwater but have no connection to natural wetlands or navigable waters. There are approximately 10,000 crushed stone or sand and gravel mining sites in the United States, each of which contains at least one pond or other excavation potentially

subject to the migratory bird rule (and often many more).[2] Dredge or fill activities often are necessary to support mining operations, and active surface mines are not a suitable habitat for migratory birds. Upon completion of mining operations, the site typically is reclaimed under state law and post-mining uses consistent with reclamation requirements are then determined. In many instances, wetlands are retained or created and the land does become a habitat for migratory birds. In other cases, different post-mining land uses are chosen, such as the balefill at issue here.[3] Mining and post-mining land use decisions historically have been reserved for state and local land use planning authorities.

The migratory bird rule can be an unwarranted but effective tool for overruling state mining policies and stopping new or expanded mining operations, because it is used to assert permitting jurisdiction over dredge or fill activities involving virtually any isolated pool of water where migratory birds might conceivably land. Once jurisdiction is claimed, a permit can be denied based on the circular logic that the contemplated activities would destroy the potential habitat. The rule also can inhibit post-mining land use and value – as it did in this case – by subjecting future activities to the Section 404 permitting requirements. Informal assertion of the rule often is sufficient to kill a mining or post-mining project as a

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[2] This does not include coal, metal or other mining sites also potentially subject to the rule.

[3] Another example is the ski resort complex at Park City, Utah, a major venue for the upcoming Winter Olympic Games in 2002. The Park City area is a former mining district.

result of the time and expense added by permit proceedings or jurisdictional challenges. In the end, the careful decisions of state legislatures and land use planning authorities with respect to use of mined and mineable land are superceded by the will of the Corps.

SUMMARY OF ARGUMENT

There is no statutory or constitutional basis for applying the migratory bird rule to require Section 404 permits for dredge or fill activities at isolated mining ponds. Congress clearly restricted the program to the navigable waters of the United States, and justified the program under the Commerce Clause as necessary to protect water quality in those waters. There is no indication of any congressional intent, nor is there any constitutional justification, for broader application of the program.

In extending the Section 404 program beyond its statutory and constitutional bounds, the Corps is impinging on State authority to conduct mining and post-mining land use planning. State laws and policies governing use of mineable land and post-mining land uses can be overridden by a federal mandate to convert the land into a bird sanctuary. Congress never intended any such result, and it is clearly inconsistent with this Court's decisions interpreting the Commerce Clause.

For these reasons, explained further below, NSA respectfully requests the Court to make it clear that the migratory bird rule cannot be used to extend the Section

404 program to isolated mining waters that have no connection to navigable waters of the United States.

ARGUMENT

I. THERE IS NO STATUTORY OR CONSTITUTIONAL BASIS FOR APPLYING THE MIGRATORY BIRD RULE TO ISOLATED PONDS AT MINING OPERATIONS

A. Statutory Authority

As discussed at length in Petitioner's Brief, the Corps' jurisdiction under Section 404 of the Clean Water Act is limited to "waters of the United States" that are "navigable." Though Congress and this Court have extended this jurisdiction beyond waters that are "navigable in fact," the Corps has not been given *carte blanche* to regulate isolated ponds with no connection to navigable waters.

The Clean Water Act is aimed at "major waterways" such as a "river, lake, stream or ocean."[4] Congress intended to encompass not only these waters, but also their tributaries and other waters that could be made navigable "with reasonable improvement." See, e.g., 2 Legis. Hist. at 1495 (1972 Senate Report), 1 Legis. Hist. at

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[4] S. Rep. No. 414, 92d Cong., 2d Sess. 7 (1972) (discussing Senate Committee findings), *reprinted in* 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Committee on Public Works by the Library of Congress), Ser. No. 93-1 at 1425 (1973) [hereinafter "Legis. Hist."].

250 (remarks of Rep. Dingell on conference bill). Relying in part on this legislative history, this Court has held that the Act extends to wetlands adjacent to navigable waters because those wetlands "play a key role in protecting and enhancing water quality" in the navigable waters. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985).[5] In that case, however, the Court expressly declined – twice – to address whether the Act extends to isolated wetlands or other water bodies not capable of affecting the quality of navigable waters (474 U.S. at 124 n.2, 131-32 n.8). Nothing in the Act or its legislative history supports such an extension. See *United States v. Wilson*, 133 F.3d 251, 255-56 (4th Cir. 1997) (Corps jurisdiction does not extend to intrastate nonnavigable waters); 33 C.F.R. § 329.4 (navigable waters are those "susceptible for use to transport interstate or foreign commerce"). The Corps itself has admitted that on at least one occasion. See 45 Fed. Reg. 33290, 33398 (1980) (isolated wet areas not navigable waters; no need to exempt them from Corps regulations).

Clearly, Congress never intended to regulate mining ponds as navigable waters of the United States. Where necessary, discharges *from* mining ponds *into* navigable waters are regulated under Sections 301, 304 and 402 of

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[5] The remarks of Rep. Dingell cited above, which also were cited by this Court in *Riverside Bayview Homes*, provide a detailed example of congressional intent on this issue (474 U.S. at 133). Mr. Dingell cited 12 judicial precedents, each of which involves a body of water that was used or could be used as a link in the chain of waterborne commerce among the states. Most of the cases focus on once navigable waters that were no longer navigable as a result of obstructions.

the Act (33 U.S.C. §§ 1311, 1314, 1342).[6] Mining ponds are not regulated as navigable waters themselves. The Act also includes special provisions for mine water control that include no suggestion of regulation as "navigable waters" under Section 404 (see 33 U.S.C. §§ 1257, 1257a).[7] In yet another provision, the Act indicates that mine water may be regulated if necessary in areawide waste-water management plans, again making no mention of potential regulation under Section 404. See 33 U.S.C. § 1288(b)(2)(G) (2000); 1 Legis. Hist. at 299 (1972 Conference Report); 2 Legis. Hist. at 1454-58 (1972 Senate Report).

The Corps recently recognized that mining ponds are not navigable waters of the United States. In proposing a new "nationwide permit" (NWP) for mining operations last year, the Corps proposed the following language on jurisdictional issues:

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[6] See 40 C.F.R. §§ 434 (effluent limitations for coal mining); 436 (mineral mining and processing); 440 (ore mining and dressing) (2000). The legislative history indicates that Congress intended for EPA to address activities involving mining ponds, including dredge and fill activities, in the "information and guidelines" published under Section 304 as the basis for the effluent limitations. See 1 Legis. Hist. at 307 (1972 Conference Report); 796 (1972 House Report); 2 Legis. Hist. at 1470-71 (1972 Senate Report). Cf. *Fertilizer Institute, Inc. v. EPA*, 935 F.2d 1303, 1310 (D.C. Cir. 1991) (discharge *into* "unenclosed containment structures" not a "release into the environment" under CERCLA).

[7] See also 1 Legis. Hist at 772 (1972 House Report); 2 Legis. Hist. at 1438 (1972 Senate Report). Both reports discuss a number of mine water control initiatives, none of which mentions Section 404 regulation.

Water-filled depressions (e.g., pits, ponds, etc.) created in any area not previously considered a "water of the United States," as a result of mining, processing, and reclamation activities, shall not be considered a "water of the United States" until one of the following situations occurs:

(1) All construction, mining, excavation, processing, and reclamation activities have been ceased and the affected site has been fully reclaimed pursuant to an approved reclamation plan; or

(2) The resulting body of water and adjacent wetlands meet the definition of "waters of the United States" (see 33 C.F.R. Part 328.3(a)) and any one of the following criteria are met:

(a) all construction, mining, excavation, processing and reclamation activities have ceased for a period of five (5) consecutive years;

(b) the property is no longer zoned for mineral extraction; or

(c) the same or successive operators are not actively mining on contiguous properties; or

(d) reclamation bonding, if required, is no longer in place. 64 Fed. Reg. 39336-337 (July 21, 1999).

However, in the final NWP rule, the Corps withdrew this proposed jurisdictional clarification, raising once again the specter of Section 404 regulation of isolated mining ponds under the migratory bird rule or other jurisdictional interpretations. See 65 Fed. Reg. 12860 (March 9, 2000).

Mine waters are fully regulated under other provisions of the Act, and there is no indication that Congress intended to regulate them under Section 404. Further, the Section 404 program does not apply to isolated waters that are not connected to navigable waters of the United States. Accordingly, isolated mining ponds cannot be swept into the Section 404 program under the migratory bird rule. This is so not only for statutory reasons, but from a constitutional perspective as well, for reasons to which we now turn.

B. Constitutional Authority

The court below found it "well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999). As we have seen, however, it is more accurate to say that the Act reaches as many "navigable waters of the United States" as the Commerce Clause allows. This reveals a fundamental flaw in the Seventh Circuit's analysis of the constitutional issues.

The court began its analysis by citing this Court's opinion in *United States v. Lopez*, 514 U.S. 549 (1995) for the proposition that a federal statute based on the Commerce Clause must serve one of three principles: (1) regulation of the channels of interstate commerce; (2) regulation of the instrumentalities of interstate commerce, or persons or things in commerce; or (3) regulation of activities that "substantially affect" interstate commerce (191 F.2d 849). The court went on to analyze the migratory bird rule under the third principle. *But that*

entirely misses the point that Congress justified the Section 404 program solely under the first principle. As discussed above (and in much greater detail in Petitioner's Brief), the program was enacted to regulate water quality in the navigable waters of the United States. There was no discussion whatsoever of any other intent that might support a broader application under the migratory bird rule or any other constitutional theory, and that should be the end of the inquiry here.

This becomes clear upon attempting to justify the migratory bird rule under the "substantial effect" test of the third principle. Again, the court cites *Lopez* for a three-pronged inquiry as to whether the rule is justified by a "substantial relation" to interstate commerce: (1) is there a substantial aggregate interstate economic effect; (2) is there a "jurisdictional element" that ensures case-by-case inquiry into effects on interstate commerce; and (3) are there express congressional findings with respect to effects on interstate commerce? Yet the opinion provides no detailed discussion of these factors (191 F.3d at 849-51). And in this case, the last two questions can be answered summarily. Yes, there is a clear jurisdictional element, and it restricts the Section 404 program to the navigable waters of the United States. Yes, there are express congressional findings, and they are limited to protection of water quality in the navigable waters of the United States. Had the court focused on how *Congress justified* the Section 404 program, rather than on how *the court* thought the program *could be justified*, it could not

possibly have upheld application of the migratory bird rule to isolated mining ponds.[8]

This leads to further problems in the court's discussion of the aggregate interstate economic effect of the rule, vividly illustrated in the case of isolated waters at mining operations. According to the Seventh Circuit, the migratory bird rule is justified because millions of people spend billions of dollars hunting, trapping and observing migratory birds, and the cumulative loss of wetlands has hindered these activities by reducing species populations (191 F.3d at 850). But dredge or fill activities at mining excavations not connected to wetlands or navigable waters have nothing to do with loss of natural wetland habitats. Ponds at active mining operations generally are not desirable as habitat. Nor are mining facilities appropriate places for hunting, trapping or bird watching activities. Indeed, most (if not all) state mining statutes include public safety provisions intended in part to *prevent* such activities at mining operations.[9]

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[8] See *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring) (it is *Congress'* justification of the nexus to interstate commerce that the Court must review).

[9] See, e.g., Utah Code Ann. § 40-8-7(1)(j) (2000) (mining operations must be conducted "so as to minimize or prevent hazards to public safety"); Utah Admin. Code R647-2-109, R647-3-109, R647-4-111 (2000) (warning signs, fences, barriers or berms required where necessary); accord., O.C.G.A. 12-4-71 (2000); GA Admin. Code 391-3-3.08 (2000); 45 I.L.C.S. 50/1.1 (Interstate Mining Compact); 62 Ill. Admin. Code 1816.133 (2000).

Application of the migratory bird rule to mining ponds is not necessary to advance the interstate economic interests cited by the Seventh Circuit and undermines the sound public policy of encouraging safety at mining operations. Here, as in *Lopez*, the link between the migratory bird rule and a substantial effect on interstate commerce, if any, is simply too "attenuated." *United States v. Morrison*, 120 S.Ct. 1740, 1751 (2000). As the Court stated in *Lopez*:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states . . . This we are unwilling to do (514 U.S. at 567-68).

In this case, Congress has not even purported to exercise its authority in such a manner. Clearly, use of the migratory bird rule to extend the Section 404 program to isolated mining waters cannot be justified under the *Lopez* and *Morrison* decisions.

II. THE MIGRATORY BIRD RULE USURPS STATE AUTHORITY TO CONDUCT MINING LAND USE PLANNING

The migratory bird rule can turn mines into bird sanctuaries. If migratory birds are observed at a mining site, it becomes a potential habitat. It is then subject to the Section 404 permit program, and permits necessary for further mining or post-mining activities are likely to be

denied to avoid destruction of the "habitat." Active mining operations must cease, and state decisions on reclamation requirements and post-mining land uses are effectively overruled by the Corps' determination that the site must become a habitat for migratory birds.

This case illustrates these problems clearly. State land use planners had decided to convert a former mining site into a municipal balefill. An economically stagnant and unproductive property could thus be used to produce revenue and serve a vital community need. Clearly, this was a win-win situation from the local public interest perspective, with no perceptible downside. Yet it was negated through application of the migratory bird rule, and the site has essentially become a sanctuary for migratory birds that few, if any, venture to hunt or observe.

This flies in the face of long-standing state policies governing mining operations, mined land reclamation and post-mining land use. For example, the Utah legislature has enacted a comprehensive Mined Land and Reclamation Act based on a finding that responsible mining and post-mining activities are "essential to the economic and physical well-being of the state and the nation." Utah Code Ann. § 40-8-2, *et seq.* (2000). The same is true in Georgia, where the legislature has recognized that mining activity provides significant economic benefits to the state and should be encouraged in a manner consistent with protection of public health, safety and welfare. See O.C.G.A. 12-4-71 (2000). Nevada has adopted a similar statutory scheme. See Nev. Rev. Stat. Ann. Title 46, Chapter 519a (2000). Each of these statutory programs provides comprehensive state regulation of mining operations, post-mining reclamation and subsequent land

use. Virtually all states with significant mining activity have adopted similar programs.

Sixteen states have adopted the Interstate Mining Compact, which declares that mining is "of basic significance" to the economies and the well-being of the signatory states, recognizes that the states have primary responsibility to assure sound mining and post-mining practices, and establishes policies and procedures for attaining that goal.[10] The Compact states the following findings and purposes, among others:

- The effects of mining on the availability of land, water and other resources for other uses present special problems which properly can be approached only with due consideration for the rights and interests of those engaged in mining, those using or proposing to use these resources for other purposes, and the public.

- Such variables as soil structure and composition, physiography, climatic conditions, and the needs of the public make impracticable the application to all mining areas of a single standard for the conservation, adaptation, or

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[10] The states are Illinois (45 I.L.C.S. § 50/1.1), Indiana (Ind. Code Ann. Title 14, Ch. 4), Kentucky (K.R.S. § 350.300), Louisiana (La. R. S. 15-901), Maryland (Md. Nat. Res. Code Title 7, Subtitle 7), Missouri (R.S. Mo. § 444.400), North Carolina (N.C. Gen. Stat. § 74-37), Ohio (O.R.C.Ann. § 1514.30), Oklahoma (45 Okl. Stat. § 851), Pennsylvania (52 P.S. § 3252), South Carolina (S.C. Code Ann. § 48-21-10), Tennessee (Tenn. Code Ann. § 59-10-101), Texas (Tex. Nat. Res. Code § 132.001), Virginia (Va. Code Ann. § 45.1-271), West Virginia (W.Va. Code § 22C-10-1) and Wyoming (Wyo. Stat. § 30-4-101).

restoration of mined land, or the development of mineral and other natural resources.

- The States are in a position and have the responsibility to assure that mining shall be conducted in accordance with sound conservation principles, and with due regard for local conditions.

- The Compact is intended to assist the party States in their efforts to facilitate the use of land and other resources affected by mining, so that such use may be consistent with sound land use, public health, and public safety, and to this end to study and recommend, wherever desirable, techniques for the improvement, restoration or protection of such land and other resources.

- The Compact is intended to assist in achieving and maintaining an efficient and productive mining industry and in increasing economic and other benefits attributable to mining.

The ultimate effect of the migratory bird rule is to supplant these state programs and policy choices with a federal mandate based on protection of migratory birds. Even if the rule, as applied to isolated mining ponds, had a reasonable relationship to this goal – which it does not – and even if Congress had intended to apply the Section 404 program in this manner – which it did not – there would *still* be significant constitutional problems with this approach. Quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937), the *Lopez* Court stated:

> In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual

> system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and created a completely centralized government." 514 U.S. at 557; accord, *U.S. v. Morrison*, 120 S.Ct. at 1748-49; *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. at 307-313 (Rehnquist, J., concurring).

This is precisely the effect of the migratory bird rule on state mining and reclamation programs affecting approximately 10,000 mining sites in the crushed stone and sand and gravel industries alone.

And it is clear that no such effect was intended, or even contemplated, when Congress adopted the Section 404 program. As discussed above, there is no indication that Congress intended to extend the program beyond the navigable waters of the United States. Further, Clean Water Act Section 101 provides:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and the rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . (33 U.S.C. § 1251(b)).

Congress has spoken clearly on these issues. Neither the Clean Water Act nor its legislative history provides any authority for Section 404 regulation of isolated mining waters, and the Act expressly reserves related land use decisions to the states. The states have exercised their

authority through enactment of comprehensive mining and post-mining land use laws. The migratory bird rule cannot be applied in any manner that intrudes upon state primacy in these areas.

CONCLUSION

Congress never intended to extend the Section 404 permit program to isolated mining ponds, and there is no constitutional justification for any such extension. Application of the program in such a manner causes impermissible federal intrusion into state authority to conduct mining and post-mining land use planning, potentially affecting as many as 10,000 crushed stone or sand and gravel mining sites in the United States. The Court's opinion in this case should make it clear that the migratory bird rule cannot be applied in any manner that extends the Section 404 permit program to isolated mining waters that are not connected to navigable waters of the United States.

Respectfully submitted;

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July 27, 2000